91-1223

NO.

Supreme Court, U.S.
FILED
JAN 8 1992
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

OCTOBER TERM, 1992

WILLIAM D. SANDERS,

PETITIONER

vs.

UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

JAMES D. CAUSEY, Counsel of Record
230 Adams Avenue
Memphis, Tennessee 38103
(901) 526-0206

Attorney for Petitioner,
William D. Sanders

TABLE OF CONTENTS

		Appendix Pages
A.	Opinion of Court of Appeals for Sixth Circuit, dated October 11, 1991	1
B.	Magistrate's Proposed Findings of Fact, Proposed Conclusions of Law, and Recommended Disposition	3
C.	Search Warrant and Affidavit	22
D.	Fourth Amendment to the United States Constitution	38
E.	Fourteenth Amendment to the United States Constitution	39
F.	Rule 12 of the Federal Rules of Criminal Procedure	43
G.	Rule 41 of the Federal Rules of Criminal Procedure	49

NOT RECOMMENDED FOR PUBLICATION

No. 91-5267

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
	)	ON APPEAL FROM THE
Plaintiff/ Appellee	)	UNITED STATES
	)	DISTRICT COURT FOR
	)	THE WESTERN DISTRICT
v.	)	OF TENNESSEE.
	)	
WILLIAM D. SANDERS,	)	
	)	
Defendant/ Appellant	)	

Decided and Filed _____

BEFORE: RYAN and NORRIS, Circuit Judges; DUGGAN, District Judge*

PER CURIAM. Defendant, William D. Sanders, appeals the district court's denial of his motion to suppress evidence. He entered a conditional plea

---

*The Honorable Patrick J. Duggan, United States District Judge for the Eastern District of Michigan, sitting by designation.

of guilty, reserving the right to appeal the denial of this motion to suppress.

Having had the benefit of oral argument, and having carefully considered the record on appeal and the briefs of the parties, we are unable to say that the district court erred in refusing to suppress the evidence.

As the reasons why the motion to suppress should be denied have been articulated by the district court, the issuance of a written opinion by this court would be duplicative and serve no useful purpose. Accordingly, the ruling of the district court and its judgments of conviction and sentence are affirmed upon the reasoning set out in the magistrate's proposed findings of fact, proposed conclusions of law, and recommended disposition of September 13, 1990.

ISSUED AS MANDATE: 11/5/91

COST: No Cost

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	NO.
	)	
vs.	)	90-20074-GA
	)	
WILLIAM D. SANDERS,	)	
	)	
Defendant.	)	

PROPOSED FINDINGS OF FACT, PROPOSED CONCLUSIONS OF LAW, AND RECOMMENDED DISPOSITION

Defendant herein William D. Sanders, has filed a motion seeking an order suppressing all evidence obtained as a result of his supposedly unlawful arrest, and the subsequent search, on or about March 9, 1990, in Obion County, Tennessee. This motion was referred to the United States Magistrate for hearing and for recommended disposition. An evidentiary hearing was set on numerous occasions, but was finally held on August 29, 1990.

PROPOSED FINDINGS OF FACT

1. Some time after noon on Friday, March 9, 1990, Bart McEntire, a special agent for the United States Alcohol, Tobacco, and Firearms agency, went to a rural area in Obion County, Tennessee (just outside South Fulton, Tennessee, and very near the Tennessee-Kentucky line), which is in the Western District of Tennessee. Agent McEntire wished to set up surveillance of a resident on Wolf Creek Road, in Obion County, Tennessee.

2. Although Agent McEntire testified that at the time of this surveillance, he did not know who owned this residence, it seems clear from the proof that he either knew the occupant's name or at least knew that the occupant was a member of the Hell's Angels motorcycle club. The occupant was in fact defendant William D. Sanders. The residence was listed in the name of Sanders' deceased grandfather, and

had been willed to Sanders.

3. Prior to setting up surveillance on Sanders' residence, Agent McEntire went to the Obion County Sheriff's office, and recruited some County law enforcement agents to assist him in this surveillance. A Tennessee Highway Patrol officer also assisted.

4. The purpose of this surveillance was to observe activities at this residence, including people and vehicles. These vehicles were to be identified by license numbers (and their ownership checked), and the people who visited were to be identified (and, in many cases, followed). Agent McEntire suspected that residents of this home on Wolf Creek Road were engaged in drug trafficking. Agent McEntire placed himself and the Obion County law enforcement agents helping him in strategic and concealed positions.

Agent McEntire instructed his helpers to stay out of sight, but to obtain tag numbers, direction of travel, etc., of any vehicles. These officers were instructed not to stop any vehicles unless the officers actually saw a violation of the law, and then to make the stops far away from Sanders' house so as to avoid exposing this surveillance. Agent McEntire testified that he fully expected this surveillance to last at least two (2) weeks.

5. At about 5:30-5:45 P.M., on March 9, 1990, Agent McEntire saw a blue pickup truck arrive at the Sanders address, carrying a male driver and a female passenger. These stayed for about fifteen (15) minutes. One of the State officers tried to follow this pickup, but was unsuccessful. Then, at about 7:30-7:45 P.M., a second pickup truck arrived, carrying two (2) males and a dog. These men stayed for about twenty (20) minutes

then came out, carrying beer bottles. Witnesses testified that these two (2) individuals stopped and urinated in the Sanders front yard, in full view of the road; they then got into their truck and drove off.

6. Agent McEntire later, at about 8:30 P.M., saw defendant William Sanders come out of the house, enter a red pickup truck, and drive off. McEntire radioed Larry Ross, a Tennessee Highway Patrolman (who was also assisting in this surveillance), asking him to follow Sanders. Ross was driving a van, with a rookie special agent for ATF riding with him. Ross also had a "drug-sniffing" dog with him.

7. The proof showed that defendant William Sanders, who proceeded east on Wolf Creek Road and then north on U.S. Highway 45, was headed toward the Hells Angels club house, just across the State

line in Kentucky.

8. Ross followed defendant William Sanders on Wolf Creek Road, and noticed that Sanders was driving erratically. More specifically, Sanders' vehicle would from time to time veer off onto the side of the road, across the curb white line,[1] then coming back into its proper driving position. Further, Ross noticed that Sanders' vehicle would from

9. Ross concluded that Sanders' driving was a danger to others, and that from time to time speed up, getting very close to the vehicle in front of it. Sanders would on these occasions be required to apply his brakes, causing his brake lights to come on. Ross saw Sanders drive in this fashion on Wolf Creek Road, and also on Highway 45.

---

[1] This line was referred to by counsel for defendant as the "fog line", and seems an appropriate designation.

Sanders might very well be intoxicated. Cognizant, however, of McEntire's earlier instructions, Ross waited until Sanders had left the area under surveillance. Further, Ross felt that his vehicle (a van) was not an appropriate vehicle to be used, if Sanders were to be arrested for driving under the influence of an intoxicant, since there might be some difficulty in transporting Sanders to a nearby jail.

10. Ross therefore radioed Jerry Vastbinder, a criminal investigator for the Obion County Sheriff's office (who was also involved in this surveillance operation). Ross knew that Vastbinder had a more appropriate vehicle, and had an Obion County Deputy Sheriff (Deputy Nickie Sadler) riding with him. Ross advised Vastbinder that the driver of the red pickup truck ahead of him appeared to be driving under the influence of an intoxicant and

requested that he stop this vehicle.

11. Vastbinder caught up with Ross and positioned himself so he could see Sanders' red pickup truck. Vastbinder also noticed that the pickup truck was veering over across the "fog line" and "tailgating". Vastbinder thereupon passed Ross, caught up with Sanders, and pulled his vehicle over.

12. Sanders stopped his vehicle, about ten (10) to fifteen (15) feet ahead of Vastbinder's vehicle. Vastbinder stayed with his vehicle while Deputy Nickie Sadler went up to Sanders' vehicle. Sadler requested Sanders to get out of his vehicle and to walk back to Vastbinder. This was for the purpose of observing Sanders to see whether his walk was unsteady, indicating intoxication.

13. Sadler had directed Sanders to provide Vastbinder with his driver's license. When Sanders left his truck to

walk back to Vastbinder, he left the left or driver's door open. Sadler remained near the truck. Sadler looked into the open door of the pickup truck, and saw a pistol protruding from a holster, in the middle of the seat of this pickup truck. He also observed, in the middle of the floorboard, a green overnight kit and a shirt.

14. Sadler called back to Vastbinder and said that Sanders had a gun on the seat of his truck. Vastbinder then pulled his weapon and placed Sanders under arrest for the State charge of carrying a pistol. Handcuffs were placed on Sanders, and he was placed in the back seat of Vastbinder's vehicle. Sadler removed the pistol and determined that it was loaded. Sadler searched the green overnight kit and found it to contain marijuana. Also found in the shirt was a plastic bag containing a white substance, field tested as

being cocaine. Sanders had in his possession $706.00 in cash. Also found were books with numbers written in them.

15. It was later developed that Sanders had not been drinking alcohol. No tests were made regarding whether Sanders had recently smoked marijuana or had sniffed or "shot up" cocaine.

16. Trooper Ross came up soon after this arrest. Vastbinder, Ross, McEntire, and possibly another officer went to the Obion County Sheriff's office and, after placing Sanders in jail, prepared an affidavit and a proposed warrant for the search of the Wolf Creek Road residence of Sanders. A State Judge of appropriate jurisdiction was called and, at approximately midnight, these officers went to the Judge's home. The Judge, after reading the affidavit and requiring certain corrections, issued the search warrant.

17. These officers, armed with this

search warrant, went to the Wolf Creek Road residence, searched it and found approximately 90 grams of methamphetamine[2] in Sanders' bedroom along with two pistols and approximately $1,200.00 in cash.

18. The affidavit for this search warrant outlined the above-mentioned surveillance. It also stated the following:

> "Lt. Vastbinder further has conducted drive-by surveillances (sic) of the residence of Sanders and recorded several vehicle registrations of the vehicles parked at the residence. Upon checking the registrations of the vehicles, Lt. Vastbinder determined that several of the registered owners were reported to be involved in drug trafficking in the Obion County area."

19. The affidavit also stated:

> "A further search of the vehicle (Sanders' vehicle, at the time of his arrest) produced a small quantity of marijuana and drug paraphernalia. In addition, several books were found, one of which contains numerous numerical amounts

---

[2] Originally incorrectly identified as cocaine.

being added and subtracted. Your affiant knows the numerical amounts are consistent with amounts normally charged by drug dealers for an ounce of cocaine or methamphetamine. The total amounts of these additions and subtractions total over $23,000.00".

PROPOSED CONCLUSIONS OF LAW

20. Defendant has argued that his motion to suppress should be granted because (1) the stop of his vehicle was without justification, and/or was pretextual; (2) the subsequent search of his vehicle was unlawful; (3) the affidavit to the search warrant was inadequate as a matter of law to justify the issuance of a search warrant; and (4), if the search warrant was invalid, no reasonably well-trained officer could have relied upon its validity.

21. It is submitted that the testi-

mony of the officers justifies the proposed finding of fact made herein that their decision to stop defendant was made because he appeared to be driving under the influence of an intoxicant and was thus a danger to others. That being so, it is submitted, there is no need to determine whether the pretextual use by an officer of minor traffic offenses to stop a vehicle (where a "reasonable officer" might not have done so under different circumstances) justifies a court in concluding that the stop was invalid. See, e.g., U.S. v. Smith, 799 F.2d 704, 708 (11th Cir. 1986); U.S. v. Miller, 821 F.2d 546, 549 (11th Cir. 1987).

22. Motor vehicles may be stopped by law enforcement officers, under Terry v. Ohio, 392 U.S. 1 (1968), where, under the totality of the circumstances, the officers have a particularized and objective basis for suspecting the driver of crimi-

nal activity. U.S. v. Cortez, 449 U.S. 411, 417-418 (1981); Delaware v. Prouse, 440 U.S. 648, 663 (1979).

23. It is submitted that these officers saw defendant, from time to time, veer off onto the side of the road, then back onto the driving lane, and saw the defendant speed up, get too close to traffic ahead, thereafter having to apply his brakes. This persistent conduct provided, it is submitted, a "particularized" and "objective" basis for suspecting that defendant was driving his pickup truck while under the influence of an intoxicant. The stop, therefore, it is submitted, was justified. U.S. v. Pino, 855 F.2d 357, 361 (6th Cir. 1988), modified 866 F.2d 147 (6th Cir. 1989), cert. denied, ___ U.S. ____, 110 S.Ct. 1160 (1990).

24. Since this investigative stop was, as previously submitted, lawful, it was reasonable for these officers to re-

quire defendant to step outside his vehicle. Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977).

25. Further, since this investigative stop was, as previously submitted, lawful, it was permissible for the stopping officer to search the passenger compartment of the truck, in those areas where a weapon might be placed or hidden. The fact that defendant was outside the pickup truck when this search was conducted is irrelevant. Michigan v. Long, 463 U.S. 1032, 1049, 1052 (1983).

26. It is therefore submitted that the discovery by Deputy Sadler of the pistol in defendant's pickup was consistent with the Fourth and Fourteenth Amendments of the United States Constitution.

27. The possession of this loaded pistol was a violation of State law, and justified these officers in making a custodial arrest of defendant. Where there

has been a lawful custodial arrest of the occupant of a motor vehicle, officers may, as a contemporaneous incident of that arrest, search the entire passenger compartment of that vehicle. New York v. Belton, 453 U.S. 454, 460 (1981).

28. It is therefore submitted that the marijuana and other controlled substances, as well as the books with numbers contained therein, were properly seized incident to this arrest.

29. Since these drugs (and the books) were, as previously indicated, lawfully seized, it is submitted that they could have, and should have, been included as a part of the affidavit submitted to the State Judge in attempting to convince him to issue the search warrant for defendant's home.

30. The affidavit submitted with this search warrant request indicated that there were several vehicles seen at defen-

dant's address from time to time, some registered to persons reportedly involved in drug trafficking in Obion County.[3] The affidavit further indicated that defendant had drugs on his person when arrested, and also had books which, to an experienced law enforcement officer, indicated that defendant was trafficking heavily in drugs.[4] It is submitted that an issuing magistrate could justifiably deduce from these facts that there was probable cause that defendant was keeping drugs at his home, and could thus

---

[3] Counsel for defendant was prevented from examining officers about this. There was no claim that Franks v. Delaware, 438 u.S. 154 (1978), was implicated in this motion. This evidence of traffic was not considered in making the above Proposed Findings of Fact regarding the search of the vehicle. However, absent a Franks situation, this court cannot go behind the affidavit for a search warrant previously issued.

[4] A court is justified in giving consideration to inferences and deductions drawn by "trained officers". U.S. v. Cortez, 449 U.S. 411, 418 (1981).

issue a search warrant for defendant's home.

31. It is therefore submitted that the search warrant was not improperly issued, and the evidence found at defendant's home was properly seized.

RECOMMENDED CONCLUSION

32. For the foregoing reasons, it is recommended that the defendant's motion to suppress be denied in its entirety.

All parties are advised that all objections to this report and recommendation must be filed within ten (10) days or such objections may be deemed waived by the District Court. Additionally, such a failure to file within ten (10) days may be treated as a waiver of the right to appeal the District Court's order hereon. U.S. v. Walters, 639 F.2d 927 (6th Cir. 1981); Patterson v. Mintzes, 717 F.2d 284 (6th Cir. 1983); Thomas v. Arn, 474 U.S. 140 (1985); see also FED. R. CIV. P. 72(b).

Respectfully submitted: This 12th day of September, 1990.

JAMES H. ALLEN,
United States Magistrate

SEARCH WARRANT

State of Tennessee
Obion County

TO THE SHERIFF, ANY CONSTABLE OR ANY POLICE OFFICER OF SAID COUNTY, Proof by affidavit having been made before me by Larry Ross, Trooper, that there is probable cause for believing that William D. Sanders has/have in his/her/their possession cocaine, marijuana, other controlled substances, firearms and ammunition and all records, books, ledgers and devices used in the manufacture, sale, distribution or storage of said cocaine, marijuana, other controlled substances, firearms and ammunition . . . . . to be searched for in accordance with the Laws of the State of Tennessee, upon the following described property namely: white wood framed house with black trim, and all persons, vehicles and outbuildings located on said premises. Said property

can be found by travelling south of Hwy. 45E from the South Fulton City Hall for approximately 4.8 miles to the intersection of Hwy. 45E and Wolf Creek Road, proceed west on Wolf Creek Road for approximately 0.8 miles where said property is located on the south side of Wolf Creek Road, this being the residence of William D. Sanders, located in the 16th Civil District in Obion County, Tn. being the premises occupied by William D. Sanders, situate in Obion County, Tennessee, you are therefore commanded to make immediate search of the person and premises herein above described for the following property: cocaine, marijuana, other controlled substances, firearms and ammunition and all records, books, ledgers and devices used in the manufacture, sale, distribution or storage of said cocaine, marijuana, other controlled substances, firearms and ammunition . . . . . .

and if you find the same or any part thereof, to bring it forthwith before me, at my office in Union City, of said County and State.

This 10th day of March, 1990.

_____ Title Judge Court Circuit

Signature of Judge or Magistrate

Issued on March 10, 1990 12:10 P.M.

To: Larry Ross, THP

_ _ _ _ _ _ _ _('s) COPY

AFFIDAVIT

STATE OF TENNESSEE
COUNTY OF OBION

Personally appeared before me Trooper Larry Ross and made oath that he has good ground and belief, and does believe that William D. Sanders is/are in possession of the following described property, namely: cocaine, marijuana and other controlled substances and firearms and ammunition and all records, books, ledgers and devices used in the manufacture, sale, distribution or storage of said cocaine, marijuana, controlled substances, firearms and ammunition . . . . . to be searched for in accordance with the Laws of the State of Tennessee, upon the following described premises, namely: A white wood framed house with black trim and all persons, vehicles and outbuildings located on said premises. Said pre-

mises can be found by traveling south on Highway 45E from the South Fulton City Hall for approximately 4.8 miles to the intersection of Highway 45E and Wolfe Creek Road; proceed west on Wolfe Creek Road for approximately 0.8 mile where said premises is located on the south side of Wolfe Creek Road. This being the residence of William D. Sanders located in the 16th Civil District in Obion County, Tennessee

and his reasons for such belief are that affiant has [observed] [received information from] _____

(Here put facts and observations leading to belief of grounds for warrant)

(See Attached Affidavit)

_____

_____

_____

_____

_____ . . . .

Furthermore, _____

(Here put additional infor-

_____

mation, or report of stolen property

---

described as above with time and place)

He therefore complains and asks that a warrant issue to search the person and premises of the said William D. Sanders above described in said County, where he believes said personal property above is now possessed.

Trooper Larry Ross
(Signature of officer)
(Affiant)

Sworn to and subscribed before me this 10th day of March, 1990.

(Signature of Judge or Magistrate)

Title: Judge Court: Circuit

Obion County, Tennessee.

STATE OF TENNESSEE

_____ County.

STATE OF TENNESSEE

vs.

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

OFFICER'S RETURN

The within warrant came to hand, I executed it on this ___ day of _____, 19__, by searching the person(s) and premises herein described, by taking therefrom and bringing before _____

Title: _____

Court: _____

The following: (Here desribe property seized)

See attached inventory sheet.

_____

_____

Signed: _____
Sheriff (or constable) (or officer)

_____ County, Tennessee.

_____

JUDGMENT ON WARRANT

Due and proper return having been made of the within warrant, the property

seized as described in the said return, shall be retained, subject to the orders of the _____ Court of _____ County, and the within warrant, affidavit, and return shall be filed in the office of the Clerk of said Court.

This ____ day of _____, 19___.

Signed: _____
Title: _____
Court: _____

On 3-9-90, law enforcement officers began a surveillance on the residence of William Sanders located at Rt. 2, Box 105, Wolf Creek Rd., McConnell Community, Obion County, Tenn. William Sanders is known to law enforcement officers to be a member of the Hell's Angel's Motorcycle Club, Kentucky Chapter. Lt. Jerry Vastbinder received information within the past two months that a Sanders resident on Wolf Creek Rd. in the McConnell Community was dealing in narcotics and stolen property. Lt. Vastbinder further has conducted driveby surveillances of the residence of Sanders and recorded several vehicle registrations of the vehicles parked at the residence. Upon checking the registrations of the vehicles, Lt. Vastbinder determined that several of the registered owners were reported to be involved in drug trafficking in the Obion County area.

While conducting the surveillance of the residence on this date (3-9-90, at approximately 8 P.M.), Barry Callahan, S/A, TABC, and Bart McEntire, S/A, ATF, observed two vehicles arrive at the residence. The persons that arrived at the residence stayed for a very short time and then left. At approximately 8:30 P.M., S/A McEntire and Callahan observed Sanders exit his residence carrying a shirt and other items. Sanders placed these items in a pickup truck in the driveway of the residence. Sanders then returned to the residence and approximately 5 minutes later exited carrying a green cloth bag. Sanders then departed the residence in the truck. S/A McEntire radioed Trooper Larry Ross, THP, to request that Trooper Ross determine the vehicle registration of the truck. Trooper Ross pulled in behind the truck and observed the driver of the vehicle, William Sanders, driving the ve-

hicle in an unsafe manner by veering across the center line and tailgating a vehicle driven in front of Sanders. Trooper Ross radioed and advised Lt. Jerry Vastbinder of the driving violations and requested that Lt. Vastbinder stop the vehicle. Lt. Vastbinder and Deputy N. Sadler stopped the vehicle at the intersection of Purchase Pkway and U.S. 51. Deputy Sadler upon approaching the vehicle observed a revolver in a holster in the front seat next to Sanders. Lt. Vastbinder and Deputy Sadler at this time arrested William Sanders for illegal possession of a weapon, to wit, a firearm. After placing William Sanders under arrest, Deputy Sadler searched Sanders' vehicle and found a packet of white powder in the pocket of a shirt that way laying on the seat of the vehicle, beside Sanders. This white powder field tested positive as cocaine. A further search of

the vehicle produced a small quantity of marijuana and drug paraphernalia. In addition, several books were found, one of which contains numerous numerical accounts being added and subtracted. Your affiant knows the numerical accounts are consistent with amounts normally charged by drug dealers for an ounce of cocaine or methamphetaine. The total amounts of these additions and subtractions total over $23,000.00.

Your affiant therefore believes that presently at this time, based on the following facts and circumstances, William Sanders has stored in his residence at Rt. #2, Box 105, Wolf Creek Rd., cocaine, marijuana, cash and other items associated with drug trafficking. Further, your affiant also has information that at this time the residence is still occupied by at least one female. That due to the arrest of the Sanders subject and the female

being present at the residence, that evidence of the previously mentioned crimes, illegal possession of dangerous drugs, may be destroyed.

AFFIDAVIT

I, Bart McEntire, being duly sworn state as follows:

I am a Special Agent with the Bureau of Alcohol, Tobacco and Firearms assigned to the Memphis, Tennessee.

On March 9, 1990, William D. Sanders was arrested by the Obion County Sheriff's Department on Hwy. 45E, carrying a 44 caliber revolver and approximately 2 grams of cocaine. On March 10, 1990 a state search warrant was executed on the residence of William D. Sanders, located on Wolf Creek Road in the McConnell Community of Obion County. During the search of the residence, approximately 90 grams of cocaine was located in a green tackle box in William Sanders bedroom. In addition, two firearms, a Browning 9 mm pistol, and a 32 caliber Charter Arms pistol were located in the proximity of the cocaine. Further-

more, approximately $1200 in cash was found in a false bottom STP container. The affiant knows this information of his own personal knowledge by being present during the execution of the search warrant and speaking personally to Lt. Jerry Vastbinder the arresting officer involved on the March 9, 1990 arrest.

_____
Bart McEntire

Sworn to and subscribed
before me this 12th day
of March, 1990, at 1:40 P.M.

_____
Honorable James Allen
U.S. Magistrate

Amendment IV - United States Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV - United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for Pres-

ident and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an

officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or

any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Rule 12. Pleadings and Motions Before Trial; Defenses and Objections.

(a) PLEADINGS AND MOTIONS. Pleadings in criminal proceedings shall be the indictment and the information and the pleas of not guilty, guilty and nolo contendere. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

(b) PRETRIAL MOTIONS. Any defense, objection, or request which is capable of determination without the trial of the

general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

(1) Defenses and objections based on defects in the institution of the prosecution; or

(2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings); or

(3) Motions to suppress evidence; or

(4) Requests for discovery under Rule 16; or

(5) Requests for a severance of charges or defendants under Rule 14.

(c) MOTION DATE. Unless otherwise provided by local rule, the court may, at the time of the arraignment or as soon thereafter as practicable, set a time for the making of pretrial motions or requests and, if required, a later date of hearing.

(d) NOTICE BY THE GOVERNMENT OF THE INTENTION TO USE EVIDENCE.

(1) At the Discretion of the Government. At the arraignment or as soon thereafter as is practicable, the government may give notice to the defendant of its intention to use specified evidence at trial in order to afford the defendant an opportunity to raise objections to such evidence prior to trial under subdivision (b)(3) of this rule.

(2) At the Request of the Defendant. At the arraignment or as soon thereafter as is practicable the de-

fendant may, in order to afford an opportunity to move to suppress evidence under subdivision (b)(3) of this rule, request notice of the government's intention to use (in its evidence in chief at trial) any evidence which the defendant may be entitled to discover under Rule 16 subject to any relevant limitations prescribed in Rule 16.

(e) RULING ON MOTION. A motion made before trial shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, but no such determination shall be deferred if a party's right to appeal is adversely affected. Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.

(f) EFFECT OF FAILURE TO RAISE DEFENSES OR OBJECTIONS. Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.

(g) RECORDS. A verbatim record shall be made of all proceedings at the hearing, including such findings of fact and conclusions of law as are made orally.

(h) EFFECT OF DETERMINATION. If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that the defendant be continued in custody or that bail be continued for a specified time pending the filing of a new indictment or information. Nothing in

this rule shall be deemed to affect the provisions of any Act of Congress relating to periods of limitations.

(i) PRODUCTION OF STATEMENTS AT SUPPRESSION HEARING. Except as herein provided, rule 26.2 shall apply at a hearing on a motion to suppress evidence under subdivision (b)(3) of this rule. For purposes of this subdivision, a law enforcement officer shall be deemed a witness called by the government, and upon a claim of privilege the court shall excise the portions of the statement containing privileged matter.

Rule 41. Search and Seizure.

(a) AUTHORITY TO ISSUE WARRANT. Upon the request of a federal law enforcement officer or an attorney for the government, a search warrant authorized by this rule may be issued (1) by a federal magistrate, or a state court of record within the federal district, for a search of property or for a person within the district and (2) by a federal magistrate for a search of property or for a person either within or outside the district if the property or person is within the district when the warrant is sought but might move outside the district before the warrant is executed.

(b) PROPERTY OR PERSONS WHICH MAY

BE SEIZED WITH A WARRANT. A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense; or (4) person for whose arrest there is probable cause, or who is unlawfully restrained.

(c) ISSUANCE AND CONTENTS.

(1) Warrant upon affidavit. A warrant other than a warrant upon oral testimony under Paragraph (2) of this subdivision shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the

federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, that magistrate or state judge shall issue a warrant identifying the property or person to be seized and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witness the affiant may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil of-

ficer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property or person specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

(2) Warrant upon oral testimony.

(A) General rule. If the circumstances make it reasonable to dispense with a written affidavit, a Federal magistrate may issue a warrant based upon sworn oral testimony communicated by telephone or other appropriate means.

(B) Application. The person who is requesting the warrant shall prepare a document to be known as a duplicate original warrant and shall read such duplicate original warrant, verbatim, to the Federal magistrate. The Federal magistrate shall enter, verbatim, what is so read to such magistrate on a document to be known as the original war-

rant. The Federal magistrate may direct that the warrant be modified.

(C) Issuance. If the Federal magistrate is satisfied that the circumstances are such as to make it reasonable to dispense with a written affidavit and that grounds for the application exist or that there is probable cause to believe that they exist, the Federal magistrate shall order the issuance of a warrant by directing the person requesting the warrant to sign the Federal magistrate's name on the duplicate original warrant. The Federal magistrate shall immediately sign the original warrant and enter on the face of the original warrant the exact time when the warrant was ordered to be issued. The

finding of probable cause for a warrant upon oral testimony may be based on the same kind of evidence as is sufficient for a warrant upon affidavit.

(D) Recording and certification of testimony. When a caller informs the Federal magistrate that the purpose of the call is to request a warrant, the Federal magistrate shall immediately place under oath each person whose testimony forms a basis of the application and each person applying for that warrant. If a voice recording device is available, the Federal magistrate shall record by means of such device all of the call after the caller informs the Federal magistrate that the purpose of the call is to request a warrant.

Otherwise, a stenographic or longhand verbatim record shall be made. If a voice recording device is used or a stenographic record made, the Federal magistrate shall have the record transcribed, shall certify the accuracy of the transcription, and shall file a copy of the original record and the transcription with the court. If a longhand verbatim record is made, the Federal magistrate shall file a signed copy with the court.

(E) Contents. The contents of a warrant upon oral testimony shall be the same as the contents of a warrant upon affidavit.

(F) Additional rule for execution. The person who executes the warrant shall enter the exact time of execution on the

face of the duplicate original warrant.

(G) Motion to suppress precluded. Absent a finding of bad faith, evidence obtained pursuant to a warrant issued under this paragraph is not subject to a motion to suppress on the ground that the circumstances were not such as to make it reasonable to dispense with a written affidavit.

(d) EXECUTION AND RETURN WITH INVENTORY. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any

property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The federal magistrate shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(e) MOTION FOR RETURN OF PROPERTY. A person aggrieved by an unlawful search and seizure or by the deprivation of property may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to

lawful possession of the property. The court shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted, the property shall be returned to the movant, although reasonable conditions may be imposed to protect access and use of the property in subsequent proceedings. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

(f) MOTION TO SUPPRESS. A motion to suppress evidence may be made in the court of the district of trial as provided in Rule 12.

(g) RETURN OF PAPERS TO CLERK. The federal magistrate before whom the warrant is returned shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and

shall file them with the clerk of the district court for the district in which the property was seized.

(h) SCOPE AND DEFINITION. This rule does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The term "property" is used in this rule to include documents, books, papers and any other tangible objects. The term "daytime" is used in this rule to mean the hours from 6:00 A.M. to 10:00 p.m. according to local time. The phrase "federal law enforcement officer" is used in this rule to mean any government agent, other than an attorney for the government as defined in Rule 54(c), who is engaged in the enforcement of the criminal laws and is within any category of officers authorized by the

Attorney General to request the issuance of a search warrant.